SHEIKH KHALED JASSEM MOHAMMAD JASSEM AL-THANI

v.

MERBOK HILIR BHD (NO 2)

HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-616-2006]
14 MARCH 2012

CIVIL PROCEDURE: *Striking out - Application for - Writ of summons and statement of claim - Application after commencement of trial - Whether application ought to be allowed - Whether delay of six years justified - Whether there were triable issues - Whether application mala fide and abuse of process of court - Whether claim obviously unsustainable - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c) & (d)*

This was an application in encl. 21 by the defendant to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of the High Court 1980 ('RHC'). The application was filed after the trial had commenced and the sole witness of the plaintiff had almost completed his examination-in-chief. The defendant submitted that encl. 21 was filed because of an oral application by the plaintiff to amend the title and para. 1 of the statement of claim by adding the name of "Sheikh Khaled Jassem M Al-Thani trading as Petroserv General Trading Establishment" and to delete the words "a company incorporated in Doha, Qatar". The defendant further alleged that it was for the very first time that the plaintiff's witness, John Frederick Keen mentioned in his witness statement tendered in court that Sheikh Khaled Jassem M Al-Thani ('Sheikh') was actually the sole proprietor of the plaintiff.

Held (dismissing application in encl 21 with costs):

(1) Only in plain and obvious cases or that a claim is on the face of it obviously unsustainable that summary process is to be sought. The application for O. 18 r. 19(1) of the RHC must be made with promptitude and as a rule before the close of the pleadings, although the court may allow an application after the pleadings are closed. However, once the case has been set down for trial, such an application must be refused; *Boo Are Ngor v. Chua Mee Liang* (foll). (paras 4 & 5)

(2) In the instant case, encl. 21 was filed after the trial had in fact commenced with the sole witness of the plaintiff almost completing his evidence in examination-in-chief. Hence, the application must be refused as a matter of law as the court was bound to the Federal Court decision in *Boo Are Ngor v. Chua Mee Liang*. (para 7)

(3) It was obvious from the documentary evidence comprising the commercial licences that it was a sole establishment under the licence holder namely the Sheikh. It was preposterous for the defendant to contend six years later, at the trial stage, that it came to light that the plaintiff was a sole proprietorship or sole establishment. All the documents available to the defendant before the trial had commenced indicated that the defendant had full knowledge or ought to know the facts. (para 8)

(4) In any event, there was a need for minute examination of all the documents and the facts of the case as contended by the parties which rendered the issues triable and which could only be resolved at the trial proper. Hence, the application to strike out was certainly not applicable; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* (refd). (para 8)

(5) The delay of six years by the defendant to apply to strike out the plaintiff's pleadings was inexcusable. Enclosure 21 was filed purely to counter or to frustrate the oral application made by the plaintiff to amend the title and para. 1 of the statement of claim. The facts were no surprise to the defendant and thus there was no question of the defendant being misled by the plaintiff. Hence, the application by the defendant was *mala fide* and an abuse of the process of the court. More so when the plaintiff's claim was not 'obviously unsustainable' and there were triable issues to be brought to trial. (para 9)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Boo Are Ngor v. Chua Mee Liang [2009] 6 CLJ 617 FC ***(foll)***

Lee Nyan Choi v. Voon Noon [1978] 1 LNS 94 FC ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd & Anor [1995]

1 LNS 218 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 743 HC ***(refd)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

YAM Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman [1994] 2 CLJ 685 HC ***(refd)***

Legislation referred to:

Rules of High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

For the plaintiff - Simon Hue Fook Chuan (V Vanaranei Vadiveloo with him); M/s Simon Hue & Assocs

For the defendant - Karen Lim (Shareen Abd Manan with her); M/s Presgrave & Matthews

Reported by S Barathi

JUDGMENT

Chew Soo Ho JC:

Enclosure 21

[1] This is an application dated 7 March 2006 by the defendant supported by an affidavit to strike out the plaintiff's writ of summons and statement of claim dated 13 October 2006 with costs pursuant to O. 18 r. 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of High Court 1980 (RHC) as they allegedly disclose no reasonable cause of action, are scandalous, frivolous or vexatious, may prejudice, embarass or delay the fair trial of the action or is otherwise an abuse of the process of the court.

[2] This application was filed after the trial had commenced and the sole witness of the plaintiff had almost completed his examination-in-chief with the introduction of his witness statement which had been admitted and marked as exh. P1. It was at the stage of adducing and marking documents when the trial was adjourned for continuation on account of another interlocutory application for amendment that this encl. 21 was filed by the defendant as a separate application to attempt to strike out the plaintiffs action.

[3] The main grounds for this application are:

(i) The plaintiff does not have the *locus standi* to sue the defendant as a sole proprietor must sue in his own name and not in his trade name which is the principal defence in the trial;

(ii) The plaintiff is separately licensed from 'Petroserv General Trading Establishment (branch)' which was the branch that the plaintiff had traded with the defendant using the name 'Petroserv - JFK Division' for convenience. The defendant contended that from the legal advice by the defendant's solicitors from Dubai, the branch is not the registered branch of the plaintiff and it had also ceased to exist upon its commercial licence having expired on 25 October 2011. As the branch existed only in 1996 when the plaintiff had commenced their business relationship with the defendant, there is no nexus between the branch and the defendant;

(iii) John Frederick Keen, the plaintiff's manager and sole witness in the trial, has traded with the defendant in 1994 whereas his employment with the plaintiff only commenced in 1997. Hence the defendant contended that John Frederick Keen was trading with the defendant in his personal capacity under the trading name of Petroserv - JFK Division. It was alleged that John Frederick Keen had an illegal arrangement with the Sheikh using the later as a front thereby contravening the anti-fronting law of Dubai; and

(iv) The plaintiff had misled the defendant into believing the existence of a company called 'Petroserv Limited' in Doha, Qatar but the defendant had never traded with the Sheikh except with John Frederick Keen under 'Petroserv - JFK Division'.

Evaluation & Findings

[4] The law pertaining to striking out of a party's pleading under O. 18 r. 19(1) RHC is well settled that it is only in a plain and obvious case or that a claim is on the face of it obviously unsustainable that this summary process is to be sought. In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, His Lordsip Mohamed Dzaiddin SCJ (as he then was) in delivering the judgment of the Federal Court has held *inter alia* at p. 7 the clear principles of the law in this respect as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule ..., and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of its 'obviously unsustainable' ... It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence ... The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari material* with our O. 33 r. 2 of the RHC) ...The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexations or that defences raised are not arguable.

[5] Another clear principle of law relating to O. 18 r. 19(1) RHC is that the application must be made with promptitude and as a rule before the close of the pleadings. However, the court may allow an application even after the pleadings are closed. But once the case has been set down for trial, such an application must be refused; per His Lordship Zulkefli Makinudin, FCJ (now CJ Malaya) in *Boo Are Ngor v. Chua Mee Liang* [2009] 6 CLJ 617 FC.

[6] Learned counsel for the plaintiff strenuously objected to such an application by the defendant at this late stage when not only had the suit been set for trial but the trial had already commenced with the examination-in-chief evidence of the sole witness for the plaintiff almost completing. He cited the words of His Lordship Abdul Malik Ishak J (now JCA) in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 743 at p. 765 that once "the action had been entered for trial and it was too late in the day for the defendant to strike out the plaintiff's claim." Learned counsel for the defendant submitted *vide* written submission that this encl. 21 was filed because of an oral application by the plaintiff to amend the title of the writ by adding the name of Sheikh Khaled Jassem M Al-Thani trading as Petroserv General Trading Establishment and to delete the words 'a company incorporated in Doha, Qatar' in para. 1 of the statement of claim. Secondly, the defendant alleged that it was for the very first time that the plaintiff's witness John Frederick Keen had mentioned in his witness statement (exh. P1) tendered in court on 14 February 2012 that Sheikh Khaled Jassem M Al-Thani ("the Sheikh") is actually the sole proprietor of the plaintiff. It was contended thirdly that without any amendments, the plaintiff's action must be struck out.

[7] I am indeed truly astonished as to the grounds raised by the defendant to file this encl. 21. As distinct for an application under O. 18 r. 19(1) RHC, an amendment to the pleading of a party can be made at any stage of the proceedings subject to the guiding principles as laid down in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; CLJ (Rep) 428 FC. Such an oral application amendment at the trial stage does not mean and cannot be construed that the pleadings are not closed when they had long been with the trial having been set down and in fact proceeded on. As categorically expressed by His Lordship Zulkefli Makinudin FCJ (as His Lordship then was) in *Boo Are Ngor v. Chua Mee Liang* (*supra*) that: "But such an application must be refused after the action has been set down for trial", encl. 21 which is filed after the trial had in fact commenced with the sole witness for the plaintiff almost completing his evidence in examination-in-chief, must certainly be refused as a matter of law as this court is bound by the Federal Court decision in *Boo Are Ngor v. Chua Mee Liang* (*supra*) which had also cited the case of *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472; see also *YAM Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [1994] 2 CLJ 685; *Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd & Anor* [1995] 1 LNS 218. Therefore, this application made after six years and after the trial has commenced cannot be maintained and must be refused.

[8] On the second ground that it was only from John Frederick Keen's witness statement that it came to light that the Sheikh was and is the actual sole proprietor of the plaintiff, I am equally surprised that such as excuse is being relied on by the defendant as the documentary evidence comprising of the Commercial Licences No. 222335 and No. 243959 issued to Petroserv General Trading Establishment and Petroserv General Trading Est (branch) respectively are so obvious that they are sole establishment under the licence holder namely the Sheikh whereas Petroserv - JFK Division was not a legal entity but was merely a name given to the aforesaid licensed branch as submitted by the plaintiff. From exh. 'JFK - 3' annexed to the plaintiff's affidavit in reply sworn by John Frederick Keen, it is abundantly clear also that at or around 30 June 2010, the defendant had been duly informed by Messrs. Horwath Mak, Auditors and Business Advisors from Dubai, UAE

that Petroserv General Trading Est Dubai, UAE is a legal entity and a valid licence holder as well as a sole establishment from its search while Pertroserv JFK Division or Petroserv JFK Division is not a legal entity and not a valid licence holder. The Sheikh was and is not a fictitious person as his passport was exhibited as exh. 'JFK - 2' in the same affidavit of the plaintiff. From exh. 'JFK - 8', various documents showed that John Frederick Keen was the Sales and/or Administration Manager under the Sponsorship of Petroserv General Trading Establishment; those documents are from Department of Health & Medical Services, Dubai, Ministry of Health UAE, Dubai Labour Bureau or Dubai Ministry of Labour Bureau. Exhibit 'JFK - 10' further shows the advertisement advertised in the UAE Commercial & Industrial Directory in the name of Petroserv General Trading Est JFK Division as an indenting agent for the defendant's MDF. The plaintiff submitted that the defendant knew all those facts and had never objected. From the superficial reading of the relevant documents exhibited by the plaintiff, the commercial licence holder in the name of the Sheikh and that the establishment was and is a legal entity while the branch was and is a licensed branch of the establishment as well as the fact that it was a sole establishment are known fact to the defendant. It is preposterous for the defendant to contend six years later at the trial stage that it only came to light when John Frederick Keen said in his witness statement that the plaintiff is a sole proprietorship or sole establishment when all available documents to the defendant before the trial had commenced indicated that defendant had the full knowledge or ought to know of such facts or that they deliberately chose to shut their eyes on those facts which are clearly reflected in the same documents. In any event, there is a need for minute examination of all these documents and the facts of the case as contended by the parties which rendered the issues triable and which can only be resolved in the trial proper. With the need to exercise minute examination of the documents and facts of the case, an application to strike out is certainly not applicable; see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* (*supra*). On the documentary evidence and the facts of this case, I do not find and certainly not satisfied that it is a plain and obvious case for recourse to this summary process under O. 18 r. 19(1) RHC.

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[9] The defendant had contended that without any amendments, the plaintiff's action must be struck out. That being their argument, why was such an application not taken up before the close of the pleadings. Even after the close of the pleadings and after the defendant had made the search and secured all relevant documents, why did they not apply to strike out the plaintiff's pleadings on ground of non-capacity or *locus standi*? Why must they wait for six years and until the trial had commenced? I find such delay is not excusable. Enclosure 21 is so filed purely to counter or to frustrate the oral application by the plaintiff to amend the title and para. 1 of the statement of claim to add in the name of the Sheikh trading as Petroserv General Trading Establishment as it was not an incorporation from the commercial licences granted. This fact is no surprise to the defendant as they had inquired or made searches and were appraised of such fact. There is thus no question of the defendant being misled by the plaintiff when documentary evidence showed unequivocally that an incorporation was an error which could be cured by an amendment. Such application by the defendant in the circumstances is *male fide* and an abuse of the process of the court.

[10] The plaintiff's statement of claim basically claimed for wrongful termination of their agency for the defendant in the Middle East for the defendant's products which termination was not disputed but the damages claimed. The plaintiff also claimed for the outstanding commissions which were due to the plaintiff but were not paid by the defendant which defendant contended that some items were due to Petroserv - JFK Division but not the plaintiff or some orders had been cancelled. *Prima facie*, I do not find such claim of the plaintiff 'obviously unsustainable' but that they are triable issues to go to trial. In *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211, the Federal Court has held *inter alia* that as long as the statement of claim disclosed some ground of action and that the mere fact that the plaintiff was unlikely to succeed at the trial of the action was not a ground for striking out. Bearing in mind the words of His Lordship Lee Han Hoe CJ (Borneo) in *Lee Nyan Choi v. Voon Noon* [1978] 1 LNS 94; [1979] 2 MLJ 28, 29 that:

> The power to dismiss an action summarily without permitting a party to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to on plain and obvious cases.

[11] I do not find that this is a proper case to resort to such drastic measure and draconian method to strike out an action summarily; see also *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133 PC.

Conclusion

[12] Having perused the affidavits filed by both parties in relation to this application and having heard all the submissions, I hold that this is not a plain and obvious case that summary process can be resorted to strike out the plaintiff's summons and statement of claim as they are many issues which should be resolved in a trial proper and there is absolutely a need for minute examination of all relevant documents filed by the parties. I also find that the fact that the plaintiff is a sole establishment with its licence being issued to the Sheikh is a known fact to all parties and it does not prejudice the defendant which had also made the necessary searches and had known of such fact. The plaintiff's claim is not obviously unsustainable or that there is no reasonable cause of action.

[13] The trial of this case has started and it ought to continue so that all evidential aspects as raised in the respective affidavits and submissions by both parties can be ventilated and resolved in the trial.

[14] For the reasons as deliberated above, I find that the defendant's application herein must be refused as it cannot be maintained especially after the trial has been set down for trial and all the most after the trial had commenced (*Boo Are Ngor v. Chua Mee Liang* (*supra*) followed). Consequently, the application by the defendant *vide* encl. 21 is dismissed with costs.